84-525

No.

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In The

Supreme Court of the United States

OCTOBER TERM 1984

BAYLOR UNIVERSITY MEDICAL CENTER,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Do hospitals and other health care providers become "recipients of federal financial assistance" or operate "programs receiving federal financial assistance" for purposes of coverage under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) by virtue of being paid by medicare and medicaid for services rendered and goods provided to patients?

2. Are medicare and medicaid direct benefit programs which are not subject to coverage under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794)?

3. Do medicare and medicaid constitute programs of insurance or guaranty which are exempt from coverage under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794)?

4. Are hospitals' and other health care providers institutional operations such as emergency room services and inpatient services "programs or activities receiving federal financial assistance" because some patients pay their bills for health care with their medicare or medicaid benefits?

PARTIES

The Parties are:

a. THE UNITED STATES OF AMERICA was Plaintiff in the District Court and is Respondent here. (The Department of Health and Human Services is the agency actually seeking relief.)

b. BAYLOR UNIVERSITY MEDICAL CENTER, Petitioner here, was Defendant in the District Court.

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BAYLOR UNIVERSITY MEDICAL CENTER,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Baylor University Medical Center, Petitioner, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on July 19, 1984.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 736 F.2d 1039 (5th Cir. 1984) and is reproduced in Appendix A of this Petition at page A-1. The Decision of the United States District Court for the Northern District of Texas in the matter is reported at 564 F.Supp. 1495 (N.D. Tex. 1983) and is reproduced in

Appendix B of this Petition at page B-1. An initial Opinion of the Court of Appeals granting a stay of the District Court's Judgment is reported at 711 F.2d 39 (5th Cir. 1983) and is reproduced at Appendix C of this Petition at page C-1.

JURISDICTION

The Court of Appeals issued its decision affirming the Judgment of the District Court on July 19, 1984, and the Mandate issued on August 17, 1984. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY PROVISIONS

Section 504 of the Vocational Rehabilitation Act of 1973, as amended (29 U.S.C. § 794) and Section 505 of the 1978 Amendments to the Vocational Rehabilitation Act of 1973 (29 U.S.C. § 794a) are reproduced in Appendix D to this Petition at page D-1.

Section 601 of Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000d) and Section 602 of Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000d-1) are reproduced in Appendix E to this Petition at page E-1.

Because of their frequent use in this Petition, the full title of the foregoing statutes will not be used. References will be to Section 504 and Title VI respectively.

STATEMENT OF THE CASE

The facts of this case are not in dispute and are established by the Parties' Answers to Interrogatories, the deposition of one of the Petitioner's Administrators, stipulations

of fact entered into by the parties, and by uncontroverted affidavits submitted by Petitioner. The matter was submitted to the District Court on cross-motions for Summary Judgment and no further testimony or other evidence was offered.

This case actually had its inception in 1980, when Respondent advised Petitioner that a hearing-impaired person had filed a complaint alleging that she had been denied access to the sign language interpreter of her choice while undergoing treatment at Petitioner's facilities.[1] Respondent went on to advise Petitioner that Respondent would be conducting an investigation of Petitioner's facilities and operations for compliance with Section 504 of the Vocational Rehabilitation Act of 1973, as amended (42 U.S.C. § 594) and related rules and regulations. At no time, either with the initial contact or in subsequent correspondence and conversation, did Respondent advise Petitioner that Respondent was seeking to investigate an alleged denial of participation in any particular program receiving federal financial assistance.

There followed a period of correspondence and telephone contacts between Petitioner and Respondent, in the course of which Petitioner advised Respondent that the only monies received by Petitioner from any federal source came as a payment for a portion of the services rendered by Petitioner to its patients who were entitled to medicare and medicaid coverage. Petitioner also denied and continues to deny the substantive allegations contained in the complaint made by

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[1]Although the Department of Health and Human Services actually is asserting the claim of a right to investigate and is the real party and interest, suit was filed by the Department of Justice in the name of the United States of America. For convenience Petitioner will use the term "Respondent" throughout this petition to refer to HHS as well as the United States.

the hearing-impaired person.[2] Based on these points, Petitioner consistently denied Respondent's demands for entry into Petitioner's facilities and access to its records on the grounds that Petitioner received no federal financial assistance and did not operate any program or activity receiving federal financial assistance. After a period of several weeks the matter seemed to die out and lay dormant until this suit was filed in 1982.

Suit was filed by Respondent on March 23, 1982, in the United States District Court for the Northern District of Texas. Jurisdiction was based on Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000d-1) and on 28 U.S.C. § 1343.

When suit was initially filed Respondent alleged that Petitioner received funds from various federal sources. During discovery it was established and is now undisputed that the only funds which can be deemed "federal funds" that are received by Petitioner are payments for services rendered under the medicare program (42 U.S.C. § 1395, et seq) and from the State of Texas under the State's federal assisted medicaid program (42 U.S.C. § 1396, et seq). Also established as undisputed facts are that the only monies received by Petitioner from medicare or medicaid are as reimbursement for costs previously incurred by Petitioner in rendering services to the beneficiaries of medi-

[2]The results of an internal investigation of the matter carried on by Petitioner, which were conveyed to Respondent as a courtesy, showed that the complaining party did in fact have available sign language interpreters from Petitioner's staff. The actual complaint apparently was that a particular friend of the complainant was not allowed in the recovery room with her after surgery. Also, the complaining party did not seek to use medicare or medicaid to pay her bills.

care and medicaid. Stated in another way, the only time that Petitioner receives any funds from either medicare or medicaid is when a patient entitled to the benefits of one or the other of those programs uses those benefits to pay the patient's hospital bills. Also undisputed is the fact that Petitioner makes no profit on medicare or medicaid payments and, in fact, suffers an actual financial loss as to each medicare or medicaid patient treated.

There being no disputed facts the matters in issue were submitted to the District Court on Cross-Motions for Summary Judgment. The District Court held that the payments made by medicare and medicaid on behalf of some of Petitioner's patients were "federal financial assistance" to Petitioner. The Court also held that because some of the medicare and medicaid payments were made as reimbursement for services rendered to persons on an inpatient or outpatient basis that Petitioner's inpatient and outpatient operations were programs receiving federal financial assistance and, therefore, were subject to coverage under Section 504. The Court ordered Petitioner to submit to Respondent's investigation demands and ordered an immediate termination of all medicare and medicaid payments to Petitioner if the investigation was not allowed. (See Appendix B to this Petition.)

On appeal, the United States Court of Appeals for the Fifth Circuit on July 19, 1984, affirmed the substantive holding of the District Court in all regards and also ordered Petitioner to submit to the investigation and other aspects of coverage. The only modification made by the Court of Appeals in the District Court's order was to allow Petitioner a 30-day period in which to submit to the investigation before medicare and medicaid payments were terminated. (See Appendix A to this Petition.)

Petitioner sought a Stay of the Issuance of Mandate from the Court of Appeals and that Stay was denied on August 17, 1984. A Motion for Stay addressed to Justice White of this Court was denied on September 7, 1984. Since that time Petitioner has advised Respondent that it will submit to the investigation but will do so under protest and that it continues to deny coverage and intends to pursue this action to this Court.

REASONS FOR GRANTING THE WRIT

The judgment below calls for review by this Court because the lower Court's holding will extend coverage of Section 504, Title VI, and other statutes far beyond anything intended by Congress. Not only Baylor University Medical Center, but every health care provider, whether hospital, doctor, nurse, drugstore, or other, will be affected by the Court of Appeals' holding. Further, the Court of Appeals' reasoning and holding will apply to a much broader range of federal programs than just medicare and medicaid and will impact directly throughout the nation and economy. Given the scope of the decision's impact and that the issues have not been considered by this Court, review should be granted.

In addition, the Writ should be granted because the Court of Appeals' decision as to what constitutes a "program or activity receiving federal financial assistance" conflicts with this Court's decisions in *Grove City College v. Bell*, ——U.S.——, 104 S.Ct. 1211, 78 L.Ed.2d ——(1984), *Consolidated Rail Corporation v. Darrone*, ——U.S.——, 104 S.Ct. 1248, 78 L.Ed.2d ——(1984), and *North Haven Board of Education v. Bell*, 456 U.S. 514, 102 S.Ct. 1912, 72 L.Ed. 299 (1982). The Court of Appeals' decision bases coverage of Section 504 and Title VI on the "follow the dollar" theory already rejected by this Court and other Courts of Appeals.

I. THE DECISION BELOW, BECAUSE OF ITS FAR REACHING IMPACT, PRESENTS A QUESTION OF FEDERAL LAW OF SUCH IMPORTANCE THAT IT SHOULD BE RESOLVED BY THIS COURT

The Court of Appeals holds that medicare and medicaid payments are "federal financial assistance" to health care providers. This despite the fact that payments are made only on behalf of patients already treated. The holding below also defines as a "program or activity receiving federal financial assistance" any part of a health care provider's operations for which medicare or medicaid will make payments.

The effect of this decision is to bring under Section 504, Title VI, and other statutes and regulations hospitals, nursing homes, doctors, private nurses, drugstores, medical supply houses, and every other health care provider. This is far more than anything ever intended by Congress. But more than that, it brings within this coverage every part of a health care provider's operations in any way related to the delivery of medical care. These results are inevitable because Petitioner is no different than any other health care provider in relation to medicare and medicaid.[3]

The broad issue of whether Title VI and Section 504 cover health care providers paid with medicare and medicaid

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[3]Respondent undoubtedly will point to its regulations which provide that since often doctors, pharmacies, and others similarly situated do not fall under Section 504 because the payments they receive are indirect, being made in many instances through the patient. See 45 C.F.R. Part 84 Appendix A, § 2. This distinction was erased by this Court's decision in *Grove City College v. Bell*, ——U.S., 104 S.Ct. 1221, 78 L.Ed.2d——(1984). There this court held that coverage applies whether assistance funds are channeled to a program directly or indirectly through an individual or other entity.

includes three distinct questions of national importance never before decided by this Court or any Court of Appeals. The questions are broad, but are based only on the decision of the Court of Appeals below. That itself demonstrates the impact of this case and why these questions need to be addressed by this Court.

1. Is a health care provider a "recipient of federal financial assistance" if the only federal funds it accepts is payment for goods and services already rendered?
2. Are medicare and medicaid, which only pay to or on behalf of a beneficiary, direct benefit programs not covered by Title VI or Section 504?
3. Are medicare and medicaid "insurance programs" which are exempt from coverage under Section 504?

A. Does Payment For Goods And Services Constitute Assistance?

The first of the three questions is whether the act of accepting payment from a government source for goods and services rendered constitutes "federal financial assistance" to the vendor. The undisputed facts in the record of this case show that medicare and medicaid pay only on behalf of beneficiaries for medical care. Sometimes payment is made directly to the health care provider, sometimes through a beneficiary, but always as payment for a patient's bill.

The Court of Appeals brushed aside the realities of the transaction, reasonir g that since the payments originated as aid they remained aid even when paid out in a business transaction. If allowed to stand, the same decision would apply to anyone doing business with a beneficiary of a government program. It would bring under Section 504 and Title VI the grocer who accepts food stamps and is reimbursed

for the goods he sold, the heating oil supplier whose customer is subsidized under the Low Income Energy Assistance Act, landlords whose tenants receive subsidies for their rent, banks that accept direct deposits of social security payments, and many others. As can be seen the potential impact of this holding is staggering.

In *Grove City College v. Bell*, ——U.S.——, 104 S.Ct. 1211, 78 L.Ed.2d ——(1984) and *North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982), this Court did discuss to some extent the so called "ripple effect" and indirect benefits, but this Court has never addressed directly the issue of when federal funds cease being aid and become just part of a normal commercial transaction. Given the potential effect of the Court of Appeals' decision it is vital that the issue now be addressed.

B. Are Medicare And Medicaid Direct Benefit Programs?

Closely related to the preceding issue is whether medicare and medicaid are direct benefit programs which are not covered by Title VI or Section 504. Again, this is a critical issue because so many federal support activities targeting individuals operate just like medicare and medicaid. Heretofore not covered by Section 504 and Title VI, all of these are suddenly subject to the full impact of these statutes and regulations.

Direct benefit programs are not covered by Section 504 or Title VI because no person or entity operates a "program or activity" receiving federal assistance. Further, Congress made it clear in the legislative history of Title VI that coverage extended only to situations where the federal government extends assistance to a state, local, or private program or activity which in turn distributes it to beneficiaries.

See, *e.g.*, *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983) cert. den. ——U.S., 104 S.Ct. 1713, 78 L.Ed.2d—— (1984); 110 Cong. Rec. 1520-1521 (remarks of Rep. Celler); 110 Cong. Rec. 1602 (remarks of Rep. Mathias); 110 Cong. Rec. 2488 (remarks of Rep. Corman); 110 Cong. Rec. 6543 (remarks of Sen. Humphrey); 110 Cong. Rec. 6561 (remarks of Sen. Kuchel).

In the instant case Petitioner receives nothing except reimbursement for part of a patient's medical bills. No payment is made to support any kind of program or activity, only to discharge a debt. Petitioner makes no decision as to who is entitled to or benefits from medicare or medicaid, makes no decisions as to what benefits are available, and distributes nothing to any beneficiary. The same is true of every other health care provider, the grocery store accepting food stamps, and anyone else doing business with a beneficiary of federal assistance.[4] Yet, if the Court of Appeals decision stands all of these normal business activities are suddenly transformed into federally assisted programs.

C. Are Medicare And Medicaid Insurance Programs?

The third issue under the general question of coverage is whether medicare and medicaid are insurance programs

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[4]The relationship between Petitioner and medicare and medicaid is different than that between the college and government in the *Grove City College v. Bell, supra*, decision. In that case, as this Court carefully pointed out, the BEOG program in issue was intended, in part, to aid college financial aid programs. In this case, medicare and medicaid never were intended to aid the health care provider, only the patient. See e.g., *Green v. Cashman*, 605 F.2d 945 (6th Cir. 1979); *Turecamo v. Commissioner of Internal Revenue*, 554 F.2d 564, 571 (2nd Cir. 1977); *Home Health Services, Inc., v. Curry*, 531 F.Supp. 476, 479 (D.S.C. 1982); *In Re Smith's Estate*, 557 F.Supp. 288 (S.D. Colo. 1983); *Paramount Convalescent Center v. Dept. of Health Care Services*, 542 P.2d 1, 5, 125 Cal. Rptr. 265 (Cal. 1975).

exempt from coverage under Section 504. The very title of the medicare statute is HEALTH INSURANCE FOR THE AGED AND DISABLED. Throughout the statute the program is referred to as insurance. The program is administered just as any private insurance program, and this and other Courts have had no trouble in recognizing medicare as insurance in other contexts. See, e.g., *Heckler v. Ringer*, ——U.S.——, 104 S.Ct. 2013, 78 L.Ed.2d —— (1984); *Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger*, 517 F.2d. 239 (5th Cir. 1975); *Sezekely v. Florida Medical Association*, 517 F.2d 345 (5th Cir. 1975); *Good Luck Nursing Home Inc. v. Harris*, 639 F.2d 573 (D.C. Cir. 1980); *Black v. American Bankers Insurance Company*, 478 S.W. 2d 434 (Tex. 1972). Medicaid, while structured differently than medicare in that it first flows to the states, also operates as an insurance program.

The clear language of Title VI, which controls Section 504 coverage, exempts programs of insurance. Despite the very language of the medicare statute, despite established precedent, and despite the very nature of medicare and medicaid, the Court of Appeals held neither was an insurance program because they are "social insurance". This clearly is judicial legislation rather than judicial interpretation.

Again, the effect of the holding below will have an immediate impact on other federal programs and will frustrate the stated intent of Congress. There are many federally financed or federally backed insurance programs such as flood insurance, the Federal Deposit Insurance Corporation operations, various farm insurance programs and others, and all of them must be characterized as "social insurance". Now, all of the participants in these programs are subject to coverage by Section 504 and Title VI despite Congressional intent to the contrary. No case has yet dealt with

the insurance exemption in this context and this Court should do so now to prevent it from being rendered meaningless.

The impact of the decision of the Court of Appeals in this case will fall not only on medicare and medicaid health care providers but also on patients relying on medicare for payment of their medical bills and it will affect the very fabric of the medicare and medicaid systems themselves. Should the suddenly covered health care providers acquiesce and accept being subject to Section 504 and the other statutes, then the cost of such compliance will be reflected in increases — probably substantial increases — in the cost of treating medicare and medicaid patients. This can only add another severe strain to medicare and medicaid insurance programs which already are in serious financial difficulty and are the subject of heated debate in Congress and elsewhere. On the other hand, as doctors, drugstores, hospitals, and other health care providers reject coverage under these cumbersome and expensive statutes and regulations, fewer will be available to treat and serve medicare and medicaid patients. This attacks the heart of medicare and medicaid which is to provide the means to the recipients of benefits — the aged, disabled, and needy — to obtain *private* medical care of their choice, just as someone who has private insurance is able to do.

That the issues in this case are of great substance and importance and have not been faced by this Court or other Courts of Appeals was stated in very definite terms by the Court of Appeals itself in its earlier decision granting a stay of the District Court's order. In *United States v. Baylor University Medical Center*, 711 F.2d 38, 40 (5th Cir. 1983), the Court of Appeals stated:

> "We have little difficulty concluding that a serious legal question is involved in this case. Whether medicare and medicaid payments constitute federal financial assistance within the meaning of the Rehabilitation Act is a serious legal question that could have a broad impact upon federal/state relations. Many private institutions, like Baylor Medical Center, receive medicare and medicaid funds but do not receive any other form of federal funding. A Court, certainly this Court, would want to make a detailed and in depth examination of this serious legal issue before opening the doors of private institutions to the probing tools of an HHS investigation. Although several cases have been cited that touch on this issue, we have been cited to no definitive ruling that would guide us in this case."

For the reasons stated above, if the Court of Appeals decision is alllowed to stand it will have an enormous negative impact on the health care industry and the medicare and medicaid systems — and far beyond them. Thus, the case presents questions of federal law of the utmost importance that should be settled by this Court.

II. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE RULES OF LAW ESTABLISHED IN PRIOR DECISIONS OF THIS COURT AND IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

Without any real analysis the Court of Appeals below ruled that because patients are able to use their medicare and medicaid benefits to pay for services that they receive in Petitioner's inpatient and emergency room operations, those areas of Petitioner's operations become programs receiving federal financial assistance. In so holding the Court of Appeals adopted what may be called the "infection

theory", i.e., that a dollar received from any federal source which can be called federal financial assistance at any point in time becomes federal financial assistance for all purposes. Further, if an entity, organization, or individual receives a single dollar of funds all of its operations become infected. This ruling is in direct conflict with the rules of law concerning the program specific nature of Section 504 and related statutes laid down by this Court in *Consolidated Rail Corporation v. Darrone*, supra, *Grove City College v. Bell*, supra, and *North Haven Board of Education v. Bell*, supra. The decision of the Court of Appeals also is in direct conflict with similar holdings of the Second Circuit in *Soberal-Perez v. Heckler*, 717 F.2d 36 (2nd Cir. 1983) cert. den. ——U.S. ——, 104 S.Ct. 1713, 78 L.Ed.——(1984), the Eleventh Circuit in *Doyle v. University of Alabama in Birmingham*, 680 F.2d 1323 (11th Cir. 1982), and with the decision of the Seventh Circuit in *Simpson v. Reynolds Metals Company, Inc.*, 629 F.2d 1226 (7th Cir. 1980). Indeed, the decision of the Court of Appeals below in the instant case is in direct conflict with its own prior decision in *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981).

Because Section 504 is modeled after the language contained in Title VI and Title IX, all three statutes have been interpreted as being coextensive in their coverage. The key with regard to the instant case is that all three statutes are "program specific" in nature. As this Court stated in its decision in *Consolidated Rail Corp. v. Darrone*, supra:

> "Section 504, by its terms, prohibits discrimination only by a 'program or activity receiving Federal financial assistance.' This Court on two occasions has considered the meaning of the terms 'program or activity' as used in Title IX. *Grove City College v. Bell*, ——U.S.——,

> 104 S.Ct. 1211, 78 L.Ed.2d ——(1984); *North Haven Board of Education v. Bell*, 456 U.S. at 535-540, 102 S.Ct. at 1925-1928. Clearly, this language limits the ban on discrimination to the specific program that receives federal funds." ——U.S. at ——, 104 S.Ct. at 1255.

Despite the clear rules of law laid down by this Court and well enunciated by other Courts of Appeals in the cases cited above, the Court of Appeals below gave only semantic recognition to the program-specific requirements of the law and then ignored those requirements.

In *Grove City College*, *North Haven*, and *Consolidated Rail*, this Court made it clear that the thrust of inquiry into what constituted a program was identification of what is inended to receive assistance. In other words, one cannot be a recipient of federal financial assistance if one does not operate a program or activity targeted for assistance. The Court of Appeals ignored this most basic requirement. Instead its reasoning makes the mere receipt of *funds* equivilent to the receipt of *assistance*.

The Court of Appeals then went further and ruled that because inpatient and emergency services are treatment areas for which medicare and medicaid will pay, those services became "programs receiving federal financial assistance". This ruling has the effect of bringing the entire institution under Section 504, because every part of a hospital, from laundry, to pharmacy, to labs, and so on, is involved in inpatient and emergency services. The Court of Appeals decision thus is nothing more than adoption of the economic ripple effect rejected by this Court in *Grove City College v. Bell*, supra and in *North Haven Board of Education v. Bell*, supra.

As already mentioned in this Petition, Congress did not intend to benefit or assist health care providers when medicare and medicaid were enacted. Health care providers such as Petitioner do nothing more than provide medical treatment to a patient and the patient incurs an obligation which he discharges with proceeds from his medicare or medicaid benefits. Petitioner administers nothing for the government and the government does not give Petitioner anything to distribute or handle for any beneficiary. To say that Petitioner's inpatient and emergency operations are "programs or activities receiving federal financial assistance" distorts the statutes and the rules of law laid down by this Court beyond any recognition.

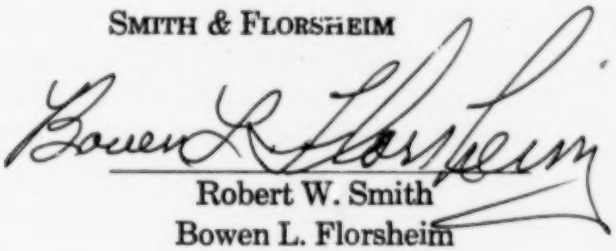
This Court in *North Haven, Grove City College* and *Consolidated Rail Corporation*, and the lower Courts in the other cases cited make it clear that the focus of inquiry is to determine what Congress intended to assist and finance with its funds. The Court of Appeals below erred seriously in ignoring that focus and instead in basing its holding on a theory discredited and rejected by this and other Courts. Since the Court of Appeals holding would extend Section 504 and Title VI beyond all legitimate bounds the Writ should be granted and that decision overturned.

CONCLUSION

For the reasons stated above, Petitioner, Baylor University Medical Center, requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

SMITH & FLORSHEIM



Robert W. Smith
Bowen L. Florsheim

Counsel for Petitioner

OF COUNSEL:
ROBERT COOK, JR.

CERTIFICATE OF SERVICE

The undersigned Counsel of Reocrd for Petitioner, Baylor University Medical Center, hereby certifies that a true and correct copy of the foregoing Petition for Writ of Certiorari to the United States Court of appeals for the Fifth Circuit was served on Counsel for the United States of America, Respondent, by deposit in the United States Mail, certified, return receipt requested, with sufficient postage thereon for delivery, and addressed to Mr. Mark L. Gross, Attorney, Appellate Section, Civil Rights Division, Department of Justice, P. O. Box 23991, L'Enfant Plaza, Washington, D.C. 20026-3391 on this the 15 day of October, 1984.

Robert W. Smith

APPENDIX

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BAYLOR UNIVERSITY MEDICAL CENTER,
Defendant-Appellant.

No. 83-1398

United States Court of Appeals, Fifth Circuit.

July 19, 1984

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, GEE and RUBIN, Circuit Judges.

GEE, Circuit Judge:

Does the receipt of Medicare and Medicaid payments subject a hospital to the coverage of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (Supp.1982), prohibiting discrimination based on handicap in programs or activities that receive federal financial assistance? Today we decide this question — one of first impression in the courts of appeal,[1] but one foreshadowed by Supreme Court authority — in the affirmative. We hold that Baylor University Medical Center (Baylor), whose inpatient and emergency room services receive Medicaid and Medicare payments, must allow the Department of Health and Human Services (HHS) access to the facility and information requested for the purposes of investigating a complaint of discrimination on the basis of handicap. In so holding, we affirm the deci-

[1]We recognize that in *NAACP v. Wilmington Medical Center,* 599 F.2d 1247 (3rd Cir. 1979), the Third Circuit affirmed a district court opinion holding, in part, that Medicare and Medicaid trigger §504. However, the court of appeals did so with no discussion of the issue; indeed, the affirmance on this point is only explicitly evident in the language of a footnote. *See* 599 F.2d at 1248, n. 4; *see* generally *infra* at 15.

sion of the district court. However, we find that the district court's immediate suspension of all Medicare and Medicaid payments to Baylor until it allows HHS the statutorily required access unduly penalizes beneficiaries of programs supported by these forms of federal assistance — i.e., patients and would-be patients in Baylor's inpatient and emergency programs. Vacating the district court's order as an abuse of discretion, we substitute our own order, that Baylor comply with HHS's request within 30 days or face termination of Medicare and Medicaid funds.

Background

In May 1980, HHS received a complaint that Baylor refused to allow a deaf patient to bring an interpreter into the hospital (at no expense to the hospital) so that she could understand her pre- and post-operative discussions with the medical staff. HHS informed Baylor by letter that, as a recipient of federal financial assistance, it was obliged to comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp.1982), and that HHS had received a complaint that Baylor's actions may have violated the Act. Section 504 states, in relevant part:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

HHS stated in the letter that it was responsible for investigating the complaint of discrimination and that an on-site review would be necessary. Baylor responded that, in its view, it is not a recipient of federal assistance for purposes of coverage of Section 504 and refused to allow the investigation. Further negotiation failed to resolve the impasse.

In March 1982, the United States filed suit, alleging that Baylor's refusal to permit HHS access to the Center's facili-

ties in order to investigate the complaint HHS had received violated Section 504 and federal regulations implementing the Act. Baylor moved for summary judgment on the ground that none of the federal funds it received constituted federal financial assistance for the purposes of Section 504. The United States cross-moved for summary judgment; noting that Baylor had stipulated that it received Medicare and Medicaid funds,[2] the United States argued that these funds constituted federal financial assistance to Baylor, assistance that empowered HHS to investigate Baylor's compliance with Section 504.

The district court granted the government's motion, 564 F.Supp. 1495 (N.D.Tex.1983). It held: (a) the government had the right to sue to enforce Baylor's contractual assurance that it would comply with Section 504, thus creating federal jurisdiction, (b) the rights and duties of Section 504 apply to recipients of federal financial assistance; since Baylor received Medicare and Medicaid funds, it is the "recipient" of the funds and so must honor those rights and duties if the funds are federal financial assistance, and (c) Medicare and Medicaid are "federal financial assistance" for the purposes of Section 504. In reaching the last conclusion, the court noted that the substantive provisions of the Rehabilitation Act were modeled on Title VI, 42 U.S.C. § 2000d *et seq.*, and Title IX, 20 U.S.C. § 1681; therefore, in interpreting the Act, courts must look to the judicial interpretation of those two major civil rights statutes. The court found support for holding that Medicare and Medicaid trigger Section 504 in HHS regulations which explicitly state that Medicare and Medicaid are "federal financial assistance for Section 504 purposes," *see* 45 C.F.R. § 80, App. A ¶ 121 (Medicare), and 45 C.F.R. § 84, App. A Subpart A, Def. 1 (Medicaid), in district court holdings in this and other circuits, and in the legislative history of Section 504, Title VI,

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[2]Baylor's records show that for the fiscal year ending June 30, 1980, the hospital's inpatient and emergency room services received over $29 million in Medicare (Part A) funds alone. Baylor stipulated that it continues to receive Medicare and Medicaid funds.

and the Medicare/Medicaid legislation. Citing *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960), for the proposition that government benefits are not a contractual interest or property right, the court rejected Baylor's argument that Medicare and Medicaid come under the exception in the Rehabilitation Act for contracts of insurance. Last, the court found that HHS had properly targeted a "program" — Baylor's inpatient and emergency room services — for investigation, and noted that the fact that the actual complainant was not a Medicare or Medicaid recipient did not prevent HHS's investigation since the Rehabilitation Act is intended to prohibit discrimination in "*programs* which receive federal financial assistance" without limiting that protection to the direct beneficiaries of the federal assistance. The court determined that Baylor had violated Section 504 and applicable regulations in denying HHS access to the information requested and ordered that all future Medicare and Medicaid payments be suspended so long as Baylor continues to deny HHS access. This Court stayed the order pending appeal. 711 F.2d 38, 39 (5th Cir.1983).

I.

In granting a stay pending appeal, we recognized that "[w]hether Medicare and Medicaid payments constitute federal financial assitance within the meaning of the Rehabilitation Act is a serious legal question that could have a broad impact upon federal/state relations" and, therefore, "a court . . . would want to make a detailed and in-dept examination of this . . . issue" before authorizing the investigation requested here. *Baylor*, 711 F.2d at 40. This appeal also requires us to define the scope of coverage: did the district court properly define the "program or activity" receiving federal assistance in permitting the HHS investigation to cover inpatient and emergency room services? Finally, is the remedy ordered by the district court — immediate termination of all Medicare and Medicaid payments until Baylor allows HHS the requested access — within the court's power and within the judicious exercise of its discretion?

We hold that Medicare and Medicaid are federal financial assistance for the purpose of Section 504, and that the district court did not err in defining inpatient and emergency room services as the "program or activity" that would be the appropriate target of HHS's investigation as the result of the alleged violation of Section 504. However, we conclude that, in the circumstances of this case, the district court abused its discretion[3] in ordering immediate termination of payments, and we accordingly revise its order so as to grant the hospital a reasonable grace period to comply with HHS investigatory requests.

A. We ground our determination that the receipt of Medicare and Medicaid payments triggers Section 504 coverage on three congruent sources: the legislative history of that group of statutes prohibiting discrimination in federally funded programs — Title VI, Title IX and the Rehabilitation Act, judicial interpretation of these, and regulations adopted pursuant to them. Our examination of these sources indicates that this court could not excuse from the coverage of Section 504 and its counterparts hospitals that participate in Medicare and Medicaid without frustrating Congress' clear and consistent purpose to protect handicapped persons and members of minority groups from discrimination in programs receiving federal assistance.

Section 504 of the Rehabilitation Act, set out above, is one piece of a larger statutory structure designed to prevent invidious discrimination in federally funded programs. The section was explicitly patterend on the seminal discrimination prohibitions of Title VI of the Civil Rights Act of 1964[4] which prohibits discrimination on the basis of race or national origin in federally funded programs and echoes verbatim the prohibitions of Title IX of the Education

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[3]We pretermit the question whether the remedy ordered by the district court is within the court's power. However, our holding logically implies that measures of the degree of severity of those ordered here would only be appropriate in the most egregious circumstances. See *infra* at 26-27.

[4]42 U.S.C. § 2000d *et seq.* (1981 and Supp. 1983).

Amendments of 1972[5] against discrimination on the basis of sex in federally funded educational programs. *See* S.Rep. No. 93-1297, 93d Cong., 2d Sess., *reprinted at* [1974] U.S. Code Cong. & Ad.News 6373, 6390 ("Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964)"; *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1280 & n. 9 (7th Cir.1977); 119 Cong.Rec. S6144-S6145 (daily ed. March 1, 1973) (remarks of Sen. Humphrey, indicating that Section 504 represented substitute for amendments to Title VI to protect the handicapped). In 1978, Congress reemphasized the identity of the prohibitions in the Rehabilitation, Comprehensive Services and Development Disabilities Amendments, Pub.L. No. 95-602. Section 120 of the Amendments, § 505(a)(2) of the Rehabilitation Act, 29 U.S.C. § 794a(a)(2) (Supp.1983) points directly to Title VI as a model for Section 504:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section [504] of this [Act].

See also, S.Rep. No. 95-890, 95th Cong., 2d Sess., *reprinted at* [1978] U.S.Code Cong. & Ad.News 7312; *Community Television of Southern California v. Gottfried*, — U.S. ——, 103 S.Ct. 885, 892, 74 L.Ed.2d 705(1983); *Gottfried v. FCC*, 655 F.2d 297, 312 (D.C.Cir.), *cert. denied*, 454 U.S. 1144, 102 S.Ct. 998, 71 L.Ed.2d 292 (1981). Accordingly, when determining whether Medicaid and Medicare payments are federal financial assistance to a program or activity under Section 504, the legislative history and judicial interpretation of Title VI and Title IX of the Civil Rights Act provide appropriate and necessary guidance, *Brown v. Sibley*, 650

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[5]20 U.S.C. § 1681 *et seq.* (1978 and Supp. 1983).

F.2d 760, 767-69 (5th Cir.1981),[6] particularly where, as here, we establish new rules of law that will have a significant impact on major policy issues.

B. Passed as part of the Civil Rights Act of 1964, Title VI had a single overriding purpose: "to make sure that the funds of the United States are not used to support racial discrimination." 110 Cong.Rec. 6544 (comments of Sen. Humphrey).[7] The statute implements this purpose by preventing service providers receiving federal funds from discriminating in programs in which individual beneficiaries of the federal aid participate.[8] Title VI binds the service provider, or "recipient," thus it affords a remedy against dis-

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[6]*See also North Haven Board of Education v. Bell,* 456 U.S. 512, 514, 102 S.Ct. 1912, 1914, 72 L.Ed.2d 299 (1982) (Title VI and IX); *Iron Arrow Honor Society v. Heckler,* 702 F.2d 549, 556-7 (5th Cir.1983) (Titles VI and IX).

[7]"The taxes which support these programs are paid into the Treasury by all citizens, regardless of their race. It is simple justice that all citizens should derive equal benefits from these programs without regard to the color of their skin." 110 Cong.Rec. 6561 (1962) (comments of Sen. Kuchel). "[O]f all the provisions of this civil rights bill, none rests on so simple and so sound a principle as does Title VI. That principle is taxpayers' money, which is collected without discrimination, shall be spent without discrimination." 110 Cong.Rec. 7064 (1964) (comments of Sen. Ribicoff). *See id.* at 9111 (comments of Sen. Keating); *id.* at 7064 (comments of Sen. Pastore). *See also Cannon v. University of Chicago,* 441 U.S. 677, 704, 99 S.Ct. 1946, 1961, 60 L.Ed.2d 560 (1979) ("Congress wanted [in Title VI] to avoid the use of federal resources to support the discriminatory practices").

[8]The statute directs federal agencies funding particular programs or activities to "effectuate the provisions of section 2000d of this title with respect to such program or activity" by issuing appropriate rules, regulations, or orders prohibiting discrimination by recipients. 42 U.S.C. 2000d-1. Once an agency issues its rules, regulations, and orders, "[f]ailure of a recipient to comply with such a rule, regulation, or order, may lead to termination or refusal of federal assistance." 110 Cong.Rec. 6544 (1964) (comments of Sen. Humphrey).

crimination by recipients to *all* participants in a federally funded program,[9] not merely to the individual beneficiaries of the federal aid[10] — since eligibility for a specific type of aid is determined by criteria unrelated to the discrimination Congress sought to prevent. *Cf. University of California Regents v. Bakke*, 438 U.S. 265, 285, 98 S.Ct. 2733, 2745, 57 L.Ed.2d 750 (1978) (Powell, J.) ("The Problem confronting Congress [vis-a-vis Title VI] was discrimination against Negro citizens at the hands of recipients of federal money.").

One specific area of discrimination in services provided by recipients concerning Congress at the time Title VI was passed was discrimination by hospitals and other medical facilities in the provision of health care services. *See, e.g.*, 110 Cong.Rec. 1661 (1964) (views of Sens. Lindsay, McCulloch, Cahill, Shriver, MacGregor, Mathias, Bromwell) (Title VI should counteract existing racial discrimination in "vendor payments for medical care of public assistance recipients. Hospitals, nursing homes, and clinics in all parts of the country participate in these programs. . . .").[11]

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[9]Title VI requires that "the public bodies or private entities receiving the benefits of any such loan refrain from racial discrimination." 110 Cong.Rec. 6545 (1964) (comments of Sen. Humphrey).

[10]*See, e.g., Bob Jones University v. Johnson*, 396 F.Supp. 597, 601 n. 15 (D.S.C.1974), aff'd, 529 F.2d 514 (4th Cir.1975):

> A "recipient" within the meaning of Title VI is not to be confused with the "beneficiary" of federal assistance. The recipient is the intermediary entity whose nondiscriminatory participation in the federally assisted program is essential to the provision of benefits to the identified class which the federal statute is designed to serve . . . . The requirements of Title VI cover recipients but not beneficiaries.

[11]Other examples of programs that concerned Congress were educational programs, *see* 110 Cong.Rec. 1661 (1964) (statement of Rep. Lindsay *et al.*) (discrimination by schools in the operation of the school lunch program); 110 Cong.Rec. 7063 (1964) (statement of Sen. Pastore) (federal impact aid to local school districts a program covered by Title VI); *see also id.* at 7065 (statement of Sen. Ribicoff); *id.* at 7101 (statement of Sen. Javits); and urban renewal payments or loans to public or private housing projects, *see* 110 Cong.Rec. 6545 (1964) (comments of Sen. Humphrey).

One year after the passage of Title VI, Congress enacted Medicare and Medicaid as a means to assure that the aged, disabled, and poor would be able to secure necessary medical services. See Pub.L. No. 89-97, 79 Stat. 286. Under Medicare Part A,[12] the subject of this lawsuit, the government pays the hospital for certain in-hospital treatment for those aged and disabled persons covered by the Act. The program is financed entirely by payroll tax deductions, 42 U.S.C. § 1395 (1983), and federal payments may be made only to hospitals which meet certain conditions of participation established by the Secretary of Health and Human Services. 42 U.S.C. § 1395d(d)(2) (1983). The Medicaid program provides to state governments federal funds that the state, after establishing a federally approved plan, uses to pay for medical aid for the poor and disadvantaged. 42 U.S.C. § 1396 (1983).

Although the issue of whether Medicare and Medicaid are federal financial assistance to a program or activity of a recipient was not extensively debated when the legislation was enacted in 1965, several Senators stated that the prohibitions of Title VI would apply to recipients of Medicare and Medicaid payments. *See e.g.*, 111 Cong.Rec. 15803 (1965) (remarks of Senator Ribicoff) (in order to receive federal payments, hospitals would have "to abide by Title VI"); 111 Cong.Rec. 15813 (1965) (comments of Sen. Hart);[13] *ibid* (comments of Sen. Pastore).[14] No senator voiced an opposing view.

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[12]Medicare has two parts, A and B. Medicare Part A covers certain hospital services for persons 62 and over entitled to either Social Security retirement benefits under 42 U.S.C. § 402 or railroad retirement benefits based on a disability, or determined to have end stage renal disease. 42 U.S.C. §§ 1395c, 1395d.

[13]We decided last year, and wrote into law, that Federal tax funds collected from all the people may not be used to provide benefits to institutions or agencies which discriminate on the grounds of race, color, or national origin. This principle will, of course, apply to hospital and extended care and home health services provided under the social security system, and will require institutions and agencies furnishing these services to abide by title 6 of the Civil Rights Act of 1964. 111 Cong.Rec. 15813 (1965).

Indeed, the Medicaid legislation passed in 1965 merely expanded an existing program of federal aid to states for health care for the poor, the Kerr-Mills program, 42 U.S.C. §§ 301-306 (1964). This program was one of those cited during the passage of Title VI as being a federal program which Title VI would cover,[15] *see* 110 Cong.Rec. 13132 (#41)

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[14]The omments of Sens. Ribicoff and Pastore are of particular import because they were closely involved in the passage of both the Civil Rights Act and the health care legislation. *See* 111 Cong. Rec. 15800 (1965) (comments of Sen. Douglas) (Ribicoff's involvement in the health care bill); 110 Cong.Rec. 6528 (1964) (comments of Sen. Humphrey) (Pastore one of the floor leaders of the legislation which became Title VI). Statements of legislators so closely involved with particular legislation are "an authoritative guide to the statute's construction," *North Haven Board of Education v. Bell*, 456 U.S. 512, 527, 102 S.Ct. 1912, 1921, 72 L.Ed.2d 299 (1982), and courts should "look to [such statements] where the meaning of the statutory word is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395, 71 S.Ct. 745, 751-752, 95 L.Ed. 1035 (1951). *See University of California Regents v. Bakke*, 438 U.S. 265, 286, 98 S.Ct. 2733, 2746, 57 L.Ed.2d 750 (1978) (Powell, J.), 333, 335 (Brennan, Marshall, White, Blackmun, JJ.) (quoting Senator Ribicoff's comments made during the enactment of Title VI as a basis for its findings on the meaning of the Act).

[15]These indications that Congress intended Medicare and Medicaid to trigger Section 504 and Title VI are supported by later legislative activity. In 1974, the Senate passed an amendment to legislation regarding a White House Library Conference. The amendment would have established that Medicare payments to nursing homes run by fraternal organizations like the Masons should not be regarded as federal financial assistance, thereby exempting those homes from coverage of Title VI. Although the Senate passed the amendment, 120 Cong.Rec. 39993-39994 (1974), it was eliminated in conference. *See* S.Rep. No. 1409, 93rd Cong., 2d Sess. 13 (1974), 1974 U.S.C.C.A.N. 6779, 6797. When the Senate discussed the conference report, the members of the conference stated that the conferees from the Senate did not support the amendment "because of its unknown effects, other than the limited purposes for which the [sponsor] sought [sic]." 120 Cong.Rec. 41078 (1974).

The rejection of even this limited exception to coverage implicitly reiterates Congress' intent that Medicare and Medicaid are federal

(1964); *see also* 110 Cong.Rec. 1661 (1964) (comments of Reps. Lindsay, McCulloch, Cahill, Shriver, MacGregor, Mathias, and Bromwell).

As noted above,[16] the language and legislative history of the Rehabilitation Act make it abundantly clear that Congress intended the scope and effect of that statute's prohibition of discrimination on the basis of handicap to be exactly equivalent to Title VI's prohibition of discrimination on the basis of race. Moreover, the legislation history of the Medicare and Medicaid bill indicates that Congress had no doubt that these forms of federal assistance would trigger federal antidiscrimination protections.[17] Our conclusion that Congress intended Medicare and Medicaid to constitute "federal financial assistance" for the purposes of Section 504 is strengthened by a recent House Committee report:

> It has come to the Committee's attention that some uncertainty remains in some quarters as to whether or not health care facilities and other providers that participate in the Medicare and Medicaid programs are recipients of Federal financial assistance. In view of the Committee, it has always been clear the Medicare and Medicaid funds constitute Federal financial assistance. The Committee wishes to reaffirm that health care facilities and other providers that receive Medicare and Medicaid funds are required, under existing statutes and long-standing Department of Health and Human Services regulations and interpretations, to provide services without discrimination not just to Medicare and Medicaid beneficiaries, but to all patients.

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financial assistance for purposes of Title VI or Section 504, since, if they were not, there would have been no need for the Senate amendment and no concern that the amendment might have implications beyond the nursing homes the sponsors sought to exempt from coverage.

[16]See *supra* at 7-8.

[17]See *supra* at 11-13.

H.R.Rep. No. 98-442, 98th Cong., 1st Sess. 77 (Oct. 26, 1983).

C. Those courts that have considered the issue before us have, with a single exception, interpreted the legislative intent as we do today. Only six cases have expressly considered whether Medicare and Medicaid constitute federal financial assistance to hospitals triggering Section 504 and Title VI. Five of these, including the only district court opinion to have received appellate affirmance on this point, hold that Medicare and Medicaid do indeed invoke the protections of the federal discrimination statutes. *See NAACP v. Wilmington Medical Center, Inc.*, 599 F.2d 1247, 1248 n. 4 (3d Cir.1979), *aff'd in relevant part*, 453 F.Supp. 280, later proceeding, 453 F.Supp. 330 (D.Del.1978), (affirming district court determination that hospital's receipt of Medicare, Medicaid and unspecified "other" assistance triggered Section 504 and Title VI); *United States v. University Hospital of SUNY at Stony Brook*, 575 F.Supp. 607 (EDNY 1983), *aff'd on other grounds*, 729 F.2d 144 (2d Cir.1984) (legislative history reveals Medicare and Medicaid are "federal financial assistance for purposes of § 504"); *United States v. Cabrini Medical Center*, 497 F.Supp. 95, 96 n. 1 (SDNY 1980), *rev'd on other grounds*, 639 F.2d 908 (2d Cir.1981) (same); *Cook v. Ochsner Foundation Hospital*, Civ. No. 70-1969 (E.D.La. February 12, 1979) (same); *Bob Jones University v. Johnson*, 396 F.Supp. 597, 603 n. 21 (D.S.C.1974), *aff'd without opinion*, 529 F.2d 514 (4th Cir.1975) (district court finds Medicare and Medicaid to be federal financial assistance for Title VI purposes); *see also Bernard B. v. Blue Cross and Blue Shield*, 528 F.Supp. 125, 132 (SDNY 1981), *aff'd without opinion*, 679 F.2d 7 (2d Cir.1982) (district court assumes that Medicare constitutes "federal financial assistance" in holding that if Medicare linked to discriminatory program plaintiffs may state a Section 504 case); *Flora v. Moore*, 461 F.Supp. 1104, 1115 (N.D.Miss.1978) (stating in dicta that Medicare and Medicaid invoke Title VI protection); *but contra Trageser v. Libbie Rehabilitation Center, Inc.*, 462 F.Supp. 424 (E.D.Va.1977), *aff'd on other grounds*,

590 F.2d 87 (4th Cir.1978),[18] *cert. denied*, 442 U.S. 947, 99 S.Ct. 2895, 61 L.Ed.2d 318 (1979).

Heavier artillery, though not directly on target, is the Supreme Court's recent decision in *Grove City College v. Bell*, ——U.S.——, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984). In *Grove City*, the Court relied predominantly on Congressional exchanges in debate to hold that a college's receipt of Basic Educational Opportunity Grants (BEOGs) — federal grants extended to college students for college expenses — requires the college to comply with Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a). Title IX prohibits sex discrimination in "any education program or activity receiving federal financial assistance." The Court noted that Congress enacted both Title IX and the BEOG program in the same bill and that the debate engendered several express references to the bill's attempt to prevent discrimination in student aid programs. The Court held that "it would indeed be anamalous" to suppose that a Congress so concerned over discrimination in student aid did not intend the federal student aid program it was then enacting to trigger a contemporaneous federal law reaching sex discrimination in education. ——U.S. at——, 104 S.Ct. at 1217.

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[18]The Fourth Circuit's opinions appears to reject the notion that the nursing home in question did not receive federal financial assistance:

> The distinction that § 120(a) draws between the relief available to federal employees and that available to employees of private institutions *receiving federal assistance* could not have been inadvertent.

590 F.2d at 89 (emphasis added).

The fallacy of the district court's reasoning in *Trageser* is underscored by the fact that in *University of Richmond v. Bell*, 543 F.Supp. 321 (E.D.Va.1982), the district court relied on the district court opinion in *Trageser* to find that BEOGs did not trigger Title IX, *see* 543 F.Supp. at 320—a holding expressly overruled by the *Supreme Court in Grove City College v. Bell*, —— U.S. —— 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984).

In reaching its conclusion, the Court specifically recognized that Title IX must be interpreted as part of a broad government policy, of which Title VI is the keystone, to prevent discrimination in programs receiving federal assistance:

> Title IX was patterned after Title VI of the Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 252, 42 U.S.C. §§ 2000d *et seq.* (1976 and Supp. V). *Cannon v. University of Chicago*, 441 U.S. 677, 684-685, 99 S.Ct. 1946, 1951, 60 L.Ed.2d 560 (1979); 118 Cong.Rec. 5807 (1972) (Sen. Bayh). The drafters of Title VI envisioned that the receipt of student aid funds would trigger coverage, and, since they approved identical language, we discern no reason to believe that the Congressmen who voted for Title IX intended a different result.

——U.S. at——, 104 S.Ct. at 1218 (footnote omitted).

Similarly in this case, Congressional discussion in 1965 regarding Medicare and Medicaid demonstrates Congress' intent that those payments invoke Title VI coverage — and, therefore, Section 504 coverage.[19] As with BEOGs, an individual is eligible for Medicare and Medicaid payments only if the recipient (here, the hospital) participates in the Medicare or Medicaid programs.

D. Courts engaging in precedential analysis of statutes, as we do here, must "accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, 94 S.Ct. 1757, 1762, 40 L.Ed.2d 134 (1974). Agency regulations implementing Section 504 and Title VI reaffirm our conclusion. The Department of Health, Education and Welfare (the predecessor to the Department of Health and Human Services) expressly included Medicare and Medicaid as programs covered by Title VI, *see* 38 Fed. Reg. 17982 (1973); 40 Fed.Reg. 18173 (1975), and HHS's regulations continue to lists these programs among those

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[19] See *supra* at 11-13.

covered by Title VI. *See* 45 C.F.R. Part 80, Appendix A at Part 1, # 121 and Part 2, # 30, The Department's regulations implementing Section 504 expressly state that service providers whose only source of federal financial assistance is Medicaid "should be regarded as recipients under the statute and the regulation and should be held individually responsible for administering services in a non-discriminatory fashion." 45 C.F.R. Part 84, App. A, Subpart A(1). (source: 42 Fed.Reg. 22677 (1977). Just as the language of Section 504 itself tracks that of Title VI, so the definitions of pertinent terms in the regulations under Section 504 substantially echo those under Title VI.[20]

E. Baylor's several arguments in opposition seek to distinguish between federal aid granted directly to an institution and federal aid received by an institution by virtue of the participation of individual beneficiaries in federal programs. Although these do not lack force, we conclude that the considerations voiced by us above and the general thrust of *Grove City* foreclose them. For example, Baylor argues that the antidiscrimination statutes recognize a distinction between direct institutional assistance and aid received through individual beneficiaries; that federal assistance tied to a federal requirement that it be used to pay for participation in a specific type of program is analogous to general-purpose governmental assistance such as food stamps or disability pay (which do not trigger the statutes), and that the coverage of the statutes does not extend to the program as a whole, but is limited to the individual beneficiaries of the particular federal aid. In *Grove City*, the Supreme Court looked to the legislative history of Title VI to reject identical arguments made by the college in the context of BEOGs and Title VI, *see* ——U.S. at——, 104 S.Ct. at 1217 (rejecting distinction between direct and indirect assistance); *id.* at note 13 (rejecting analogy between BEOGs and general purpose aid); *id.* ——U.S. at——, 104 S.Ct. at 1221, note 21

[20]*Compare, e.g.,* 45 C.F.R. § 84.3(h) (definition of "federal financial assistance" under § 504) with 45 C.F.R. § 80.13(f) (definition of "federal financial assistance" under Title VI).

(rejecting restricting coverage to beneficiaries only). The Court's course of reasoning compels us similarly to reject these arguments in the context of the Rehabilitation Act.[21] We also reject as frivolous Baylor's argument that Medicare and Medicaid are exempt from the statutory scheme because payment occurs after treatment. Qutie simply, the nature of hospital services requires payment after they are rendered, when costs can be calculated.

One further argument made by Baylor merits our brief attention. Baylor argues that Medicare and Medicaid are insurance programs and thus exempt from the coverage of Title VI and Section 504. While it is true that Title VI excludes from coverage a federal "contract of insurance or guaranty"[22] we conclude that this exception does not prevent Medicare or Medicaid from triggering Section 504. We observe first that the Rehabilitation Act, unlike Title VI, contains no such exclusion. Assuming, however, that this exception implicitly applies to Section 504,[23] neither Medi-

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[21]Two additional arguments bolster our rejection of Baylor's contention that HHS may not ground a review on complaints received from a non-beneficiary of Medicare or Medicaid. First and most important, Section 504 by its explicit language bars discrimination against any handicapped person who is a *participant* in a federally assisted *program*—not only direct beneficiaries of the federal assistance. Moreover, HHS need have received no complaint at all to review whether a recipient is discriminating, *see* 45 C.F.R. 94.61, 80.7.

[22]Title VI states "Each federal department and agency which is empowered to extend federal financial assistance to any program or activity by way of grant, loan, or contract other than a contract of insurance or guaranty, * * *." 42 U.S.C. 2000d-1. *See also* 42 U.S.C. 2000d-4.

[23]*See* 45 C.F.R. § 84.3(h) (excepting "contracts of insurance or guaranty" from Section 504; *see also* 45 C.F.R. App. A, Subpart A, commenting on § 84.3(h):

> "The proposed regulation's exemption of contracts of insurance or guaranty has been retained. A number of comments argued for its deletion on the ground that section 504, unlike title VI and title IX, contains no statutory exemption for such

care nor Medicaid is the type of contractual program Congress intended to exempt.

As the legislative history makes abundantly clear,[24] in excluding "contracts of insurance or guaranty" from Title VI, Congress intended to prevent Title VI from reaching individually owned homes financed with federally guaranteed mortgages, or individual bank accounts in a bank with federally guaranteed deposits. In other words, Congress did not want Title VI to effect a nationwide Fair Housing Act.

Although the Medicare title of the Social Security Act is "Health Insurance for the Aged and Disabled," comments during the debate reveal that legislators used the term in the sense of "social insurance"; the bill is described as "social insurance," "social legislation," or "assistance for the elderly."[25] More fundamentally, the mandatory nature of coverage and the financing of the program through mandatory

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contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended section 504 to have a broader application, in terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that section 504 be implemented in the same manner as titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty under title VI, we think it unlikely that Congress intended section 504 to apply to such contracts."

[24]See 110 Cong.Rec. 2500 (1964) (comments of Rep. Celler); *id.* at 6545 (comments of Sen Humphrey); *id.* at 6566 (analysis of House-passed version); *id.* at 9090 (comments of Sen. Gore); *id.* at 12878 (comments of Sen. Stennis); *id.* at 13378 (comments of Sen. Humphrey).

[25]See 111 Cong.Rec. 7228 (1965) (comments of Rep. King); *id.* at 7355 (comments of Rep. Farbstein); *id.* at 15630 (comments of Sen. Anderson); *id.* at 15836 (comments of Sen. Kennedy); *id.* at 15882, 18513 (comments of Sen. Fong).

payroll taxes distinguishes it from the voluntary, individually-financed agreements Congress intended to exempt.[26]

Additionally, the Supreme Court's holding in *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960), that Social Security benefits are not contractual interests and do not create property rights in the beneficiary because of the nature of the funding system, 363 U.S. at 610, 80 S.Ct. at 1372, compels finding no "contract" in Medicare Part A, which uses the same funding system as the social security disability program at issue in *Flemming*.[27]

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[26]The Attorney General's letter regarding Title VI mentioned other "contract of insurance" programs the government operated, such as Federal crop insurance or Federal employees' life insurance. These programs, unlike Medicare or Medicaid, involved individual contracts between the government and the covered individual. *See Rainbow Citrus Corp. v. Federal Crop Ins. Corp.*, 506 F.2d 467, 468 (9th Cir.1974) (description of the federal crop insurance program which authorized the government to enter into individual contracts with certain growers).

Congress rejected a proposal to replace the Medicare legislation ultimately enacted with a scheme under which coverage would be wholly voluntary and financed through premiums alone—an alternative closely patterned after private insurance plans. *See* Cong.Rec. 7220 (1965) (comments of Rep. Byrnes, sponsor of the alternative proposal.

[27]The Court's explanation of the noncontractual nature of the benefits at issue in *Flemming* might be applied almost verbatim here:

> The Social Security system may be accurately described as a form of social insurance, enacted pursuant to Congress' power to "spend money in aid of the 'general welfare,' " *Helvering v. Davis, supra*, [301 U.S. 619] at 640 [57 S.Ct. 904 at 908, 81 L.Ed. 1307], whereby persons gainfully employed, and those who employ them, are taxed to permit the payment of benefits to the retired and disabled, and their dependents. Plainly the expectation is that many members of the present productive work force will in turn become beneficiaries rather than supporters of the program. But each worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation.

Nor may Medicaid be considered a federal "contract of insurance" program. Federal assistance under Medicaid goes to a state which contributes funds and administers the program for health care for the poor and disadvantaged. Called "assistance" during the debates and in the statutes, Medicaid is in no way comparable to an insurance program, but closely resembles in its financial structure such prominent Title VI programs as the school lunch program, 42 U.S.C. §§ 1751-64 (1964), and the Hill-Burton Program for hospital construction, 42 U.S.C. § 291 (1964), in which federal assistance given to the states was distributed by the states to local school districts or hospital construction projects.[28]

Our consideration of Baylor's arguments strengthens our conclusion: Baylor's receipt of Medicare and Medicaid payments subjects it to appropriate federal action under Section 504 of the Rehabilitation Act.

II.

Section 504 prohibits discrimination based on handicap in any "program or activity" receiving federal financial assistance. Under Title VI provisions expressly applicable to

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It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.

Flemming, 363 U.S. at 609-10, 80 S.Ct. at 1372.

[28]See, *e.g.*, discussion of school lunch program at 110 Cong.Rec. 2487 (1964) (comments of Rep. Celler), *id.* at 6545 (comments of Sen. Humphrey), *id.* at 7101 (comments of Sen. Javits); discussion of Hill-Burton Act. *id.* at 1661 (statement of Rep. Lindsay, et al.), *id.* at 6544 (comments of Sen. Humphrey), *id.* at 7063 (comments of Sen. Pastore), *id.* at S. 13376 (comments of Sen. Alcott).

Section 504,[29] the scope of HHS investigations and corrective actions is limited to actions by recipients taken under or which may affect those of the recipient's programs or activities that get federal financial assistance. *See North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) (Title IX agency action must be program-specific), *Grove City*, ——U.S. at——, 104 S.Ct. at 1219, (same). Baylor argues that the district court did not specify for HHS scrutiny a "program" receiving Medicare and Medicaid, as Section 504 requires, but authorized complete investigation of the hospital as an institution.

However, we find no fault with the district court's holding that HHS may investigate Baylor's policies for handicapped patients receiving inpatient and emergency room services. A brief reference to the Medicare statute and to Baylor's own accounting statements demonstrates that Baylor's inpatient and emergency room services are the programs receiving this federal assistance and may thus be proper subjects for HHS investigation. The Medicare statute specifically mentions inpatient and emergency room services among those covered by the Act. *See, e.g.*, 42 U.S.C. §§ 1395c, 1395d, 1395f(d)(1). Also, while a recipient's bookkeeping practices may not be dispositive on the issue of which of its programs receive particular federal funds, *see Grove City*, 104 S.Ct. at 1219-22, Baylor's own records confirm that its inpatient and emergency room services receive Medicare and

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[29]Title VI "authorize[s] and direct[s]"

> "[e]ach Federal department and agency . . . empowered to extend Federal financial assistance to any program or activity . . . to effectuate [the antidiscrimination provisions of the statute] with respect to such program or activity . . . consistent with achievement of the objectives of the statute authorizing the financial assistance . . .

42 U.S.C. 2000d-1.

Medicaid funding.[30] Accordingly, the investigation authorized was properly "program specific."

III.

We turn last to the appropriateness of the remedial order imposed by the district court. Having found Baylor in violation of Section 504 in refusing to provide HHS with the requested information and access, the district court ordered all future Medicare and Medicaid payments to the hospital suspended "for as long as" Baylor continues to deny HHS access. This immediate termination of benefits stands in contrast to the administrative remedy provided by statute, under which the agency must file a report with Congress and thirty days must thereafter elapse before termination of funds or other sanction is imposed. 42 U.S.C. § 2000d-1. We find the thirty-day waiting period provided by statute indicative of Congressional intent that service providers be granted a grace period for compliance in order to avoid punishing the beneficiaries of the federal aid for the errors of service providers by abruptly depriving the providers, and hence the individual beneficiaries, of the federal aid in question. In failing adequately to consider this legislative intent in the context of the particular circumstances, we conclude that the district court abused its discretion here.

We do not mean to imply that a federal agency seeking to enforce antidiscrimination provisions of Section 504 must resort to administrative remedies. The statute expressly states otherwise: an agency may resort to "any other means authorized by law" — including the federal courts. *See, e.g., United States v. Marion County School District*, 625 F.2d 607 (5th Cir.1980), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1980,

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[30]See note 2 *supra*. (Medicare) Baylor also concedes that it receives Medicaid payments. These payments may also be made for inpatient and emergency services for beneficiaries, see 42 U.S.C. § 1396d(a)(1). While Medicaid may support a wider range of services than Medicare, the HHS investigation authorized is well within the area covered by both forms of assistance.

68 L.Ed.2d 298 (1981) (HEW permitted to sue to enforce school district's compliance agreement under Title VI). Nor do we mean to suggest that a court in the position of the district court here may not grant a remedy other than that envisioned in the context of administrative proceedings. We hold simply that the district court abused its discretion in not considering Congress' intent to cushion beneficiaries from the immediate deprivation of benefits. Moreover, we do not discern here those egregious circumstances that might warrant the imposition of a remedy as harsh as that imposed by the district court. Accordingly, we vacate the order and grant Baylor thirty days after that on which our mandate issues to comply with HHS's request; if it does not do so as of that time, we direct the immediate suspension of all future Medicare and Medicaid funds to the hospital's inpatient and emergency room services.

The order below is

AFFIRMED IN PART; VACATED AND MODIFIED IN PART.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-82-0453-D

UNITED STATES OF AMERICA,

Plaintiff,

v.

BAYLOR UNIVERSITY MEDICAL CENTER,

Defendant.

ORDER

This is an action brought by the United States to enforce the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and regulations promulgated thereunder by the Department of Health and Human Services (HHS). On the basis of certain complaints it received, HHS seeks to investigate defendant Baylor University Medical Center (Baylor) to determine whether hearing-impaired patients are provided effective services at Baylor's facilities, in compliance with Section 504. Baylor has refused to allow HHS to investigate it, on the ground that it is not a recipient of "Federal financial assistance" within the meaning of Section 504, and therefore is not required to comply with the provisions of that section. This matter is presently before the Court on Baylor's motion for summary judgment or alternatively for partial summary judgment and the government's cross-motion for summary judgment. Having considered the briefs which were submitted and heard oral argument on the motions, this Court has concluded, for the reasons set forth below, that Baylor's motion must be denied and the government's cross-motion must be granted.

I.

The following summary of the facts pertinent to this case is culled from the set of stipulated facts to which the parties agreed, as well as the various exhibits which have been attached to the parties' motions or responses to motions.

Baylor is a medical facility which receives federal funds from Medicare and Medicaid as reimbursement for services rendered to patients covered by Medicare and Medicaid. In July 1977, in accordance with Department of Health, Education and Welfare regulations, Baylor signed and filed an assurance of compliance with Section 504 in order to receive Medicare and Medicaid payments. In signing that assurance, however, Baylor did not concede that Medicare or Medicaid would constitute federal financial assistance such that it would require Baylor to comply with Section 504.[1]

Medicare, Medicaid, and private insurance all provide reimbursement to Baylor for costs incurred in rendering services to patients. That reimbursement is, in many instances, only a portion of the cost of the services rendered. The patient who is covered by private insurance must pay for the services not reimbursed by his or her insurance; no additional payments, however, are received from Medicare and Medicaid patients. The funds received from private insurance, Medicare, and Medicaid are all placed in the general operating fund of Baylor. Baylor draws from its general operating fund to pay for, among other things, supplies, building maintenance, and general operations.

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[1]Section 504 provides in pertinent part:

> No otherwise qualified handicapped individual in the United States, . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794.

On May 9, 1980, the first of three complaints from the same complainant was filed with the Regional Office of HHS in Dallas, Texas. It alleged that Baylor had refused to permit a hearing-impaired person, a patient at the hospital, access to sign language interpreter services which she had contracted for at her own expense and which she needed to communicate effectively with hospital personnel. On May 20, 1980, HHS initiated an investigation into Baylor's compliance with Section 504 in connection with services for hearing-impaired persons, by requesting pertinent data and a meeting with Mr. Boone Powell, Jr., president of Baylor.

Baylor responded through counsel on June 20, 1980, stating that it refused to subject itself to any investigation by HHS due to its belief that it received no "Federal financial assistance" within the meaning of Section 504. HHS then notified Baylor of its position that Medicare payments are considered Federal financial assistance and indicated that other payments to Baylor constitute such assistance. Baylor, however, held to its position that HHS lacks jurisdiction to investigate under Section 504. On August 25, 1981, HHS referred the case to the Department of Justice for enforcement action. The complaint in this action was filed on March 23, 1982.

Motion for summary judgment have been filed by both parties in this action. In Baylor's motion it contends: (1) that this Court lacks jurisdiction over the action; (2) that Baylor is not a "recipient" of Federal financial assistance as that term is defined in the relevant regulations; and (3) that neither Medicare nor Medicaid payments constitute "Federal financial assistance" within the meaning of Section 504 and 45 C.F.R. § 84.3 (h).[2] Fourth, Baylor raises in the

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[2]That regulation provides, in pertinent part:

> "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a *contract of insurance* or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance . . . . .

45 C.R.F. § 84.3(h) (emphasis supplied).

alternative an argument concerning the fact that Section 504 is "program-specific," i.e., the fact that it applies only to programs or activities benefited by federal financial assistance. Baylor argues that that means in this case that HHS may not conduct an investigation unless the complainant upon whose complaint the investigation would be based is him- or herself a direct beneficiary of Medicare or Medicaid. For its part, the United States argues in its cross-motion (1) that this Court does have jurisdiction over the action, (2) that Baylor is a "recipient" of federal financial assistance, and (3) that both Medicare and Medicaid constitute such assistance. Further, the United States agrees that Section 504 is "program-specific," but contends that its program-specificity does not impede the right of HHS to investigate allegations of discrimination against hearing-impaired persons in Baylor's provision of in-patient and emergency room services where those services are paid for in part through Medicare and Medicaid.

II.

The first issue to consider is the jurisdiction of this Court over this action. It is evident that such jurisdiction exists.

Pursuant to 28 U.S.C. § 1345, the district court has original jurisdiction over all civil actions commenced by the United States or by an agency thereof. Thus, jurisdiction exists so long as the United States has the right to bring this suit.

Both federal common law and statutory authority provide the United States with the right to sue in this case. The statutory authority for the Department of Justice to sue on behalf of HHS to seek enforcement of Section 504 of the Rehabilitation Act lies in 29 U.S.C. § 794a(2); 42 U.S.C. § 2000d-1; and 28 U.S.C. § 516. In addition, it is well established under federal common law that the government has the right to sue to enforce contractual assurances of compliance with the Civil Rights laws, such as the assurance of compliance with section 504 into which Baylor entered. *See United States v. Marion County School Dist.*, 625 F.2d 607,

611 (5th Cir. 1980). Consequently, jurisdiction over this action is proper, and this Court may proceed to consider the arguments of the parties in connection with the relevant substantive law.

The rights and duties conferred by Section 504 apply with respect to "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794. Baylor contends that it is not a "recipient" of Federal assistance within the meaning of Section 504 and the applicable HHS regulations. The argument lacks merit. The term "recipient" is defined in the regulations to include "any . . . institution, organization, or other entity . . . to which Federal financial assistance is extended directly or through another recipient, . . . by excluding the ultimate beneficiary of the assistance." 45 C.F.R. § 84.3(f). Assuming *arguendo* for the moment that Medicare and Medicaid are forms of Federal financial assistance, it is clear that Baylor is an institution to which Federal assistance is extended, and further that it is not Baylor but rather the eligible patients who are the ultimate beneficiaries of the assistance. Thus Baylor is a "recipient" of federal assistance, so long as Medicare or Medicaid constitute such assistance.

The chief argument raised by Baylor is that neither Medicare nor Medicaid is "Federal financial assistance" within the meaning of Section 504 and more particularly, the applicable HHS regulations. Specifically, Baylor contends that the Medicare and Medicaid funding which it admittedly receives are "insurance-type payments" and are therefore exempt from the statute's coverage by reason of the "contract of insurance" exclusion contained in HHS regulation 45 C.F.R. § 84.3(h). *See* note 2 *supra.*

The Medicare program is established under the terms of Title XVIII of the Social Security Act, 42 U.S.C. § 1395 *et seq.* The statute describes the program as an "insurance program" designed to provide "basic protection against the costs of hospital and related posthospital services," available generally to all persons age 65 or over who are entitled to retirement benefits under Title II of the Social Security

Act or under the railroad retirement system, and to all persons under 65 who have been entitled to disability benefits under Title II or the railroad retirement system for at least two years. 42 U.S.C. § 1395c. Part A of the Medicare program covers the provision of hospital insurance benefits, while Part B of the program provides supplementary medical insurance benefits.

The Medicaid program is established under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, and it is a program by which the federal government gives grants to the states in order for them to provide medical assistance for the needy, under state plans conforming with federal requirements. Federal Medicaid funds are appropriated from general federal reserves. *See* 42 U.S.C. § 1396.

In considering whether either of these programs constitutes "Federal financial assistance," several preliminary observations may be made. First it has been noted that Section 504, as a remedial statute, should be "broadly applied and liberally construed." *S-1 v. Turlington*, 635 F.2d 342, 347 (5th Cir. 1981). Next, the discrimination prohibition language contained in Section 504 was expressly modeled after the equivalent language contained in Title VI and Title IX of the Civil Rights Act, and consequently the case law developed under Title VI and IX may be referred to for guidance in explicating Section 504. *Brown v. Sibley*, 650 F.2d 760, 768 (5th Cir. 1981). In addition, this Court may take into account the interpretation which HHS has given the statutory language "Federal financial assistance" over the years, for "a court may accord great weight to the long-standing interpretation placed on a statute by an agency charged with its administration." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-5 (1974).

With these principles in mind, there are several reasons supporting the conclusion that both Medicare and Medicaid are "Federal financial assistance" within the meaning of Section 504 and do not fall within the "contract of insurance" exclusion of 45 C.F.R. § 84.3(h). First, there are other

HHS regulations which directly indicate that both Medicare[3] and Medicaid[4] are regarded as "Federal financial assistance." The most reasonable interpretation of the "contract of insurance" language would be one which would avoid conflict with these other regulations. Therefore, Medicare and Medicaid would not be excluded.

Second, the courts which have dealt with the question have generally regarded Medicare and Medicaid as federal financial assistance, and they typically have had little difficulty with the question. *See United States v. Cabrini Medical Center*, 497 F.Supp. 95, 96 n.1 (S.D.N.Y. 1980), *rev'd on other grounds*, 639 F.2d 908 (2d Cir. 1981); *Cook v. Ochsner Foundation Hospital*, No. 70-1969 (E.D. La., Feb. 12, 1979), slip. op. at 2-3; *Flora v. Moore*, 461 F.Supp. 1104, 1115 (N.D. Miss. 1978); *Bob Jones University v. Johnson*, 396 F.Supp. 597, 603 n.21 (D.S.C. 1974), *aff'd without opinion*, 529 F.2d 514 (4th Cir. 1975). *But see Trageser v. Libbie Rehabilitation Center*, 462 F.Supp. 424, 426 (E.D. Va. 1977), *aff'd on other grounds*, 590 F.2d 87 (4th Cir. 1978).

The legislative history of the Medicare program also supports the conclusion that Medicare and Medicaid are included in the meaning of federal financial assistance. The Medicare program was adopted in 1955, a year after passage of Title VI of the Civil Rights Act. Section 602 of Title VI specifically excepts any "contract of insurance" from serving as a basis for coverage of that statute. 42 U.S.C. § 2000d-1. Despite that language, comments made by legislators during debates on the Medicare bill state the view that Title VI would apply to hospitals and other instituions by virtue of their acceptance of federal funds in the form of Medicare payments. *See* 111 Cong. Rec. 15813 (1965) (remarks of Senators Ribicoff, Hart and Pastore, who were prominent in the adoption of Title VI in 1964).

Furthermore, there are characteristics of the Medicaid and Medicare programs which easily distinguish them from ordinary contracts of insurance. This is most evident in the case of Medicaid. Insurance contracts are characterized by

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[3]*See* 45 C.F.R. § 80, Appendix A, ¶ 121.

[4]*See* 45 C.F.R. § 84, Appendix A, Subpart A, Definition 1.

the spreading of risks, among the various policyholders through the payment of premiums. *See Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979). Medicaid, on the other hand, is designed as a system of federal grants to states to subsidize state programs that provide health benefits to the needy. As such, it bears little relation to the contractually-based risk-spreading which is an essential element of insurance contracts. Medicare bears a greater resemblance to a traditional insurance arrangement, but it too is distinguishable. Medicare is a form of social insurance, funded by mandatory taxes upon employers and employees. *See* 26 U.S. §§ 3101(b), 3111(b), 1401(b). As with the Social Security system, the benefits which accrue to each individual worker, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation." *Flemming v. Nestor*, 363 U.S. 603, 609 (1960) (holding that Social Security benefits are a noncontractual interest and not a property right). Thus the Medicare program is not a contract of insurance entered into the United States and either the ultimate beneficiaries or the recipient health care providers.

For these reasons, and in light of the broad construction which must be given to Section 504, this Court concludes that Medicare and Medicaid constitute federal financial assistance within the meaning of that provision and the applicable regulations.

The final issue before this Court concerns the "program-specificity" of Section 504. Section 504 provides that no handicapped persons shall, by reason of their handicap, be subjected to discrimination "under any program or activity" receiving federal financial assistance. 29 U.S.C. § 794. As the Fifth Circuit recently ruled, this program-specific requirement means that a recipient of federal funding must comply with the statute nondiscrimination provisions "when a discriminatory program is 'benefited' by Federal financial assistance or when a federally assisted program itself is infected by a discriminatory environment." *Iron Arrow Honor Society v. Hecker*, 702 F.2d 549, 562 (5th Cir. 1983) (interpreting

the identically-worded provision contained in Title IX of the Civil Rights Act). Baylor admits that its in-patient and emergency room services — the activities at its facility that HHS seeks to investigate — are paid for in part through Medicare and Medicaid. Since these activities are directly benefited by federal assistance, they are a proper subject of HHS investigation.

Despite Baylor's argument to the contrary, the right of HHS to investigate a complaint is not restricted when the patient-complainant is not a beneficiary of either of the federal assistance programs (i.e. Medicare or Medicaid) which serve as the basis for the recipient's obligation to comply with the statute. The "programs or activities" language in Section 504 refers to the programs or activities of the recipent of the federal funding; it does not refer to either the federal funding programs themselves, or to the ultimate beneficiaries of those programs. Consequently, HHS has the right to seek enforcement of Section 504 upon those programs or activities at Baylor which benefit from Medicare or Medicaid, without regard to whether a particular complainant is a direct beneficiary of one of those federal assistance programs.

III.

In conclusion, this Court is of the opinion that the Government's motion for summary judgment must be granted. There are no material issues of fact in this case. The United States seeks the right to investigate into Baylor's compliance with Section 504 in connection with the provision of effective services for hearing-impaired persons in Baylor's in-patient and emergency room services. The United States is entitled to make that investigation.

It is so ORDERED.

Dated this 7th day of June, 1983.

United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-82-0453-D

UNITED STATES OF AMERICA,

Plaintiff,

v.

BAYLOR UNIVERSITY MEDICAL CENTER,

Defendant.

JUDGMENT

This action came on for hearing before the Court, Honorable Robert M. Hill, District Judge, presiding, and the issues having been heard and a decision having been rendered,

It is ORDERED and ADJUDGED that:

(1) the defendant Baylor University Medical Center has violated Section 504 of the Rehabilitation Act of 1973 and regulations promulgated thereunder by refusing to provide the Department of Health and Human Services information and access to its premises for the purpose of investigating defendant's compliance with Section 504 in connection with the provision of services for hearing-impaired persons in defendant's in-patient and emergency room services;

(2) all future federal financial assistance to defendant shall be suspended for as long as defendant continues to deny plaintiff United States of America through the Department of Health and Human Services access to information or to its premises for the above-stated purpose; and

(3) plaintiff shall recover of the defendant its costs of action.

Dated at Dallas, Texas, this 7th day of June, 1983.

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United States District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BAYLOR UNIVERSITY MEDICAL CENTER,

Defendant-Appellant.

No. 83-1398

United States Court of Appeals, Fifth Circuit.

July 15, 1983.

Appeal from the United States District Court for the Northern District of Texas.

Before GEE, POLITZ, and JOHNSON, Circuit Judges.

PER CURIAM:

In May 1980, the United States Department of Health & Human Services (HHS) received a single complaint alleging that Baylor University Medical Center (Baylor Medical Center) had refused to permit a deaf patient to use an interpreter to aid in understanding her pre and post-operative discussions with the medical staff at Baylor Medical Center. On May 26, 1980, HHS informed Baylor Medical Center that it intended to investigate the complaint since Baylor Medical Center was allegedly a recipient of "federal financial assistance," and, hence, was obligated to comply with section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Baylor Medical Center refused to allow HHS to investigate its operations alleging that it was not a recipient of federal financial assistance, and that even if it was, HHS' right to investigate was limited to the specific federally funded programs that were the basis of a particular complaint. Following discovery, it was undisputed that the only federal funds received by Baylor Medical Center were reim-

bursement payments for services rendered to Medicare and Medicaid beneficiaries. The district court, ——F.Supp.——, held that Baylor Medical Center's receipt of Medicare and Medicaid funds constituted federal financial assistance and ordered Baylor Medical Center immediately to allow HHS to investigate its operations. Baylor Medical Center's failure to allow HHS to investigate would result in loss of all Medicaid and Medicare funds under the district court's order. The district court refused to grant Baylor Medical Center's motion for a stay pending appeal and, consequently, Baylor Medical Center has moved this Court for a stay pending appeal. We stay the district court's order pending appeal.

[2] Four factors must be considered by this Court in determining whether to stay the district court's order under Fed.R. App.P. 8. These are (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. See *Coastal States Gas Corp. v. Department of Energy*, 609 F.2d 736, 737 (5th Cir.1979); *Fortune v. Molpus*, 431 F.2d 799, 804 (5th Cir.1970); and *Belcher v. Birmingham Trust National Bank*, 395 F.2d 685 (5th Cir.1968). However, this Court has refused to apply these factors in a rigid, mechanical fashion. Indeed, in *Ruiz v. Estelle*, 650 F.2d 555 (5th Cir.1981), this Court held that the movant "need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Id.* at 565.

We have little difficulty concluding that a serious legal question is involved in this case. Whether Medicare and Medicaid payments constitute federal financial assistance within the meaning of the Rehabilitation Act is a serious legal question that could have a broad impact upon federal/state relations. Many private institutions, like Baylor Medical Center, receive Medicare and Medicaid funds but do not

receive any other form of federal funding. A court, certainly this Court, would want to make a detailed and in depth examination of this serious legal issue before opening the doors of private institutions to the probing tools of an HHS investigation. Although several cases have been cited that touch on this issue, we have been cited to no definitive ruling that would guide us in this case. See *NAACP v. Wilmington Medical Center, Inc.*, 453 F.Supp. 330, 339 n. 34 (D.Del. 1978), *aff'd in part and rev'd in part*, 599 F.2d 1247, 1248 n. 4 (3d Cir.1979); *United States v. Cabrini Medical Center*, 497 F.Supp. 95, 96 n. 1 (S.D.N.Y.1980), *rev'd*, 639 F.2d 908 (2d Cir.1981); *Bernard v. Blue Cross & Blue Shield*, 528 F.Supp. 125, 132 (S.D.N.Y.1981), *aff'd*, 679 F.2d 7 (2d Cir. 1982); and *Trageser v. Libbie Rehabilitation Center, Inc.*, 462 F.Supp. 424 (C.D.Va.1977), *aff'd*, 590 F.2d 87 (4th Cir. 1978).

Having determined that a serious legal issue is presented, we must decide whether the balance of equities weighs heavily in favor of granting a stay. We determine that the equitable balance does weigh heavily in favor of granting the stay. Significantly, Baylor Medical Center consistently has challenged HHS' authority to investigate its facilities. It is the investigation that Baylor Medical Center seeks to avoid. However, under the express terms of the district court's order, Baylor Medical Center must submit to an examination prior to appeal, or suffer the loss of all Medicare and Medicaid funds, which, of course, would have a substantial effect on the recipients of such services. The district court's order clearly has placed Baylor Medical Center between a rock and a hard place. Baylor Medical Center can either forego its challenge to HHS' authority to investigate and thereby suffer the consequences and expense of an investigation that may be ultimately determined to have been unwarranted, or lose all its Medicare and Medicaid funds. We conclude that Baylor Medical Center should not be put to this Hobson's choice until the issue of HHS' investigatory power has been decided on appeal.

We also note that no *substantial* harm will be suffered by HHS. Although HHS certainly has a right to proceed with its investigatory duties in a forthright manner, when its very authority is at issue, a delay of the investigation pending appeal will not substantially harm the investigatory process. This is especially true in this case, since HHS has received only a single complaint against Baylor Medical Center.

Finally, we conclude that granting the stay will serve the public interest. Baylor Medical Center is an enormous medical operation that provides medical attention to numerous Medicaid and Medicare recipients. We see no reason to put Baylor Medical Center to the choice of foregoing its legal position or losing all Medicaid and Medicare funding until the appellate process has run its normal course. The interest of the Medicaid and Medicare recipients would be seriously compromised should Baylor Medical Center be put to the Hobson's choice and decide to forfeit its Medicaid and Medicare funds. The normal procedures at Baylor Medical Center should not be interrupted so significantly until an appeal has been decided.

In conclusion, we emphasize that we do not decide the merits of the appeal or express any opinion on the resolution of this serious legal issue. All we do today, is hold that a stay of the district court's order should be granted pending an appeal in this case.

APPENDIX D

Section 504 of the Vocational Rehabilitation Act of 1973 (29 U.S.C. § 794)

Section 505 of the 1978 Amendments to the Vocational Rehabilitation Act of 1973 (29 U.S.C. § 794A)

Section 504

§ 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

As amended Pub.L. 95-602, Tile I, §§ 119, 122(d) (2), Nov 6, 1978, as .....

Section 505

§ 794a Remedies and attorney fees

(a) (1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved

by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Pub.L. 93-112, Title V, § 505, as added Pub.L. 95-802, Title I, § 120, Nov. 6, 1978, 92 Stat. 2982.

APPENDIX E

Section 601 of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d)

Section 602 of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d-1)

TITLE VI

Section 601

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
Pub.L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252.

Section 602

§ 2000d-1. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action.

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute

authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Pub.L. 88-352, Title VI, § 602, July 2, 1964, 78 Stat. 252.